(2)

Supreme Court, U.S.
FILED
FEB 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

Docket No.: 87-1145

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DAVID A. POTTER, Appellant,

vs.

THE WACKENHUT CORPORATION, et al,
Appellees.

Appeal from the United States Court of Appeals,
Eleventh Circuit

MOTION TO DISMISS AND, IN THE ALTERNATIVE,
MOTION TO AFFIRM

JOHN N. JENKINS, ESQUIRE
Marlow, Shofi, Smith, Hennen,
Smith & Jenkins, P.A.
Suite 201, The Bayshore Buildings
2907 Bay to Bay Boulevard
Tampa, Florida 33629
(813) 831-5599
ATTORNEY FOR APPELLEE,
THE HOME INSURANCE COMPANY

3 PP

TABLE OF CONTENTS

Table of Citations ii

I. Motion to Dismiss Because No Jurisdiction 1

A. Motion to Dismiss Appeal 1

18 U.S.C. §§241, 245, 1512 and 1513 8

42 U.S.C. §§1985(2), 2000e-2 & 2000e-3 10

29 U.S.C. §§201 and 215(a)(3) 15

28 U.S.C. §1343 18

26 U.S.C. §6051 22

Florida Statutes §440 24

Conclusion 25

B. Motion to Dismiss Because it was not Taken in Conformity 26

II. Motion to Affirm 27

Certificate of Service 29

TABLE OF CITATIONS

Aasum v. Good Samaritan Hospital,
542 F.2d 792 (9th Cir. 1976) 19

Aldabe v. Aldabe,
616 F.2d 1089 (9th Cir. 1980) 9

Alexander v. Gardner-Denver Co.,
415 U.S. 36, 94 S.Ct. 1011,
39 L.Ed.2d 147 (1974) 13

Allen v. U.S. Steel Corp.,
665 F.2d 689, (5th Cir. 1982) 14

Davidson v. Lovett,
446 F.Supp. 1171 (D.C. Ga. 1978) 6

Duffield v. Memorial Hospital Asso.,
361 F.Supp. 398 (DC W.Va. 1973) 18

Dugar v. Coughlin,
613 F.Supp. 849 (SD NY 1985) 9

George v. Aztec Rental Center,
763 F.2d 184 (5th Cir. 1985) 17

Hanford v. Davies,
163 U.S. 273, 16 S.Ct. 1051,
41 L.Ed 157 (1896) 6

Harley v. Oliver,
404 F.Supp. 450 (D.C. Ark. 1975),
aff'd on other grounds, 539 F.2d
1143 (8th Cir.) 19

Hodgson v. Arnheim & Neely, Inc.,
444 F.2d 609 (3rd Cir. 1971),
rev'd on other grounds, 410 U.S. 512,
93 S.Ct. 1138, 35 L.Ed. 2d 463,
reh. den., 411 U.S. 940, 93 S.Ct.
1888, 36 L.Ed. 2d 402. 16

Howard v. State Dept. of Highways,
478 F.2d 581 (10th Cir. 1973) 11

Jewell v. City of Covington,
425 F.2d 459 (5th Cir.) cert.
den., 400 U.S. 929 (1970) 8, 18, 19

Kirkland Masonry, Inc. v. C.I.R.,
614 F.2d 532 (5th Cir. 1980) 6

Le Mieux Bros. v. Tremont Lumber
Co., 140 F.2d 387 (5th Cir. 1944) 6

Love v. Chandler,
124 F.2d 785 (8th Cir. 1942) 19

Manfredi v. Maher,
435 F.Supp. 1106 (D.C. Conn. 1977) 28

Mantin v. Broadcast Music, Inc.
244 F.2d 204 (9th Cir. 1957) 7

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 93 S.Ct. 1817,
36 L.Ed.2d 668 (1973) 13

McNutt v. General Motors
Acceptance Corp.,
298 U.S. 178, 56 S.Ct. 780,
80 L.Ed. 1135 (1935) 7

Moriani v. Hunter,
462 F.Supp. 353 (SD NY 1978) 9

Nierbo Co. v. Bethlehem Shipbuilding
Corporation,
308 U.S. 165, 60 S.Ct. 153,
84 L.Ed. 167 (1939) 6

Prince v. Wallace,
568 F.2d 1176 (5th Cir. 1978) 24

Ray v. Bird & Son & Asset Realization Co.,
519 F.2d 1081 (5th Cir. 1975) 7

Roberts v. Lewis,
144 U.S. 653, 12 S.Ct. 781,
36 L.Ed. 579 (1892) 7

Rutherford v. American Bank of Commerce,
565 F.2d 1162 (10th Cir. 1977) 12

Sedlacek v. Hach,
752 F.2d 333 (8th Cir. 1985) 12

Smith v. McCullough,
270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926) 6

Stafford v. Muscogee County Board of Education,
688 F.2d 1383 (11th Cir. 1982) 3,14

Syrek v. Pennsylvania Air National Guard,
371 F.Supp. 1349 (W.D. Pa. 1974) 20

Turner v. Unification Church,
473 F.Supp. 367 (D.R.I. 1978),
aff'd, 602 F.2d 458 (1st Cir. 1979) 4

Wiley v. National Collegiate Athletic Assoc.,
612 F.2d 473 (10th Cir. 1979) 21

Williams v. Bennett,
689 F.2d 1370 (11th Cir. 1982),
cert. den., 104 S.Ct. 335 (1983) 22

RULES:

18 U.S.C. §241	8, 9
18 U.S.C. §245	8, 9
18 U.S.C. §1512	8, 9
18 U.S.C. §1513	8, 9
18 U.S.C. §3231	10
42 U.S.C. §1985(2)	8, 10
42 U.S.C. §2000e-2	8, 10, 11
42 U.S.C. §2000e-3	8, 10, 11
42 U.S.C. §2000e-5	12, 14
28 U.S.C. §1332	4
28 U.S.C. §1343	18, 19, 20
28 U.S.C. §2403(b)	5
29 U.S.C. §216(b)	15
29 U.S.C. §201	8
29 U.S.C. §203(d)	16, 17
29 U.S.C. §215(a)(3)	8, 15
26 U.S.C. §6051(a)	4, 22,23
26 U.S.C. §7204	23
Florida Statutes §440	5, 8, 24
Supreme Court Rule 16, 1(a)	1

Supreme Court Rule 16, 1(c) 27

Supreme Court Rule 28(c) 4

Supreme Court Rule 42, 1 1

I. MOTION TO DISMISS

Pursuant to Rule 16 of the Supreme Court Rules of the United States, Subsection 1(a), the Court will receive a Motion to Dismiss an Appeal on the ground that the Appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

Argument:

A. Motion to Dismiss this Appeal on the Ground that this Appeal is not within this Court's jurisdiction.

Initially, a brief summary of the facts on which this Appeal is based is provided pursuant to Rule 42 of the Supreme Court Rules of the United States. On May 19, 1986, Mr. Potter filed a complaint against his employer, Wackenhut Corporation, alleging a violation of his civil rights. Included as defendants

were Berger-Hembree Real Estate and Knowles Wallis, Incorporated. On July 9, 1986, Mr. Potter filed a Motion to Join the workers' compensation carrier/-insurer for Wackenhut Corporation, the Home Insurance Company.

In Mr. Potter's complaint filed on May 19, 1986, he alleged that he was threatened and assaulted by Mr. Robert McFarlane during his employment as a security officer at 35 South Boulevard of the Presidents, Saint Armands, Sarasota, Florida, on March 26, 1984. As a result of the assault he sustained permanent bodily injury and his pre-existing physical and emotional injuries were aggravated. Mr. Potter further alleged that he had given notice to his employer and complained about Mr. McFarlane's threats and Wackenhut did nothing to prevent the continued threats and subsequent assault. Mr. Potter

claimed he was coerced and intimidated by representatives of his employer, Wackenhut Corporation, not to file a police report or to seek medical care. Lastly, he alleged he had exhausted state and federal remedies to no avail and that Wackenhut Corporation had refused to release his 1985 I.R.S. W-2 Form causing him further emotional distress.

The United States District Court of the Middle District of Florida rendered an Order on November 10, 1986, dismissing Mr. Potter's Complaint for failure to state a cognizable claim within the jurisdiction of the federal court. It based its decision upon the ruling in Stafford v. Muscogee County Board of Education, 688 F.2d 1383 (11th Cir. 1982) holding that a Complaint with the E.E.O.C. was a prerequisite to maintenance of a discrimination suit under Title VII

and the ruling in Turner v. Unification Church, 473 F.Supp. 367, 376-77 (D.R.I. 1978), aff'd. 602 F.2d 458 (1st Cir. 1979) holding there was no private cause of action under 26 U.S.C. §6051(a). In addition, the District Court noted that in circumstances where no federal question was stated that diversity was required pursuant to 28 U.S.C. §1332 to maintain a federal cause of action.

On January 5, 1987, Mr. Potter filed a Notice of Appeal with the United States Supreme Court of Appeals, Eleventh Circuit. The Eleventh Circuit entered an Order affirming the ruling of the District Court on October 6, 1987, without opinion. Mr. Potter now seeks appellate review of the Order entered by the U.S. Court of Appeals, Eleventh Circuit, by the U.S. Supreme Court by way of an appeal.

Pursuant to Supreme Court Rule 28(c),

this proceeding draws into question the constitutionality of Florida Statutes Section 440 and, therefore, 28 U.S.C. §2403(b) may be applicable. A copy of this Motion has been served upon the Attorney General of the State of Florida. To the undersigned's knowledge, neither the Federal District Court of the Middle District of Florida nor the U.S. Court of Appeals, Eleventh Circuit, has certified to the Attorney General of the State of Florida the fact that the constitutionality of Florida Statute §440 has been drawn into question.

Within the federal system there are numerous pleading requirements not commonly found in the states. The reason for this is that Federal courts are courts of limited jurisdiction. Specifically, the jurisdiction of a federal court is a grant of authority given

to them by Congress. Neirbo Co. v. Bethlehem Shipbuilding Corporation, 308 U.S. 165, 167, 60 S.Ct. 153, 154, 84 L.Ed. 167 (1939). There is no presumption in favor of jurisdiction, and the basis for jurisdiction must be affirmatively shown. Hanford v. Davies, 163 U.S. 273, 16 S.Ct. 1051, 41 L.Ed. 157 (1896); Smith v. McCullough, 270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926); Le Mieux Bros. v. Tremont Lumber Co., 140 F.2d 387 (5th Cir. 1944). See also, Kirkland Masonry, Inc. v. C. I.R., 614 F.2d 532 (5th Cir. 1980); Davidson v. Lovett, 446 F.Supp. 1171 (D.C. Ga. 1978). Where jurisdiction is based on the existence of a federal question, the jurisdictional allegation must state that the cause of action arises out of a particular provision of the Constitution or Statute and the body of the Complaint must state

facts showing that the case does in fact arise under federal law. A general allegation of a federal question will not suffice if it is not supported by the matters constituting the claim for release as set forth in the Complaint. Mantin v. Broadcast Music, Inc., 244 F.2d 204 (9th Cir. 1957).

Jurisdictional allegations must be proved, Roberts v. Lewis, 144 U.S. 653, 12 S.Ct. 781, 36 L.Ed. 579 (1892), and the party invoking federal jurisdiction has the burden of proof. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1935); Ray v. Bird and Son and Asset Realization Co., 519 F.2d 1081 (5th Cir. 1975).

Based on the incident which occurred on March 26, 1984, as well as the alleged activities of the Defendants, Mr. Potter has alleged six sources of this Court's

jurisdiction to hear this cause. Specifically, he has alleged 18 U.S.C. §§241, 245, 1512 and 1513; 42 U.S.C. §§1985(2), 2000e-2 and 2000e-3; 29 U.S.C. §§201 and 215(a)(3); 28 U.S.C. §1343; 26 U.S.C. §6051(a); and, lastly, Florida Statutes §440.205. Although federal courts are liberal in their pleading practices, it is still required that a general allegation of jurisdiction must be born out by a well pleaded claim. General conclusionary allegations unsupported by facts are insufficient to constitute a cause of action. Jewell v. City of Covington, 425 F.2d 459 (5th Cir.) cert. den. 400 U.S. 929 (1970). The following discussion will show that the aforementioned grounds of jurisdiction are not applicable in this cause and, therefore, this Court lacks subject matter jurisdiction of Mr. Potter's claims against Defendant,

Wackenhut Corporation.

18 U.S.C. §§241, 245, 1512 and 1513:

The provisions of 18 U.S.C. §§241 and 245 relate to the deprivation of civil rights, however, there is no private right of action under either of these statutes. Dugar v. Coughlin, 613 F.Supp. 849 (SD NY 1985). See also, Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980); Moriani v. Hunter, 462 F.Supp. 353 (SD NY 1978). Section 1512 addresses tampering with a witness, victim or informant and Section 1513 proscribes retaliating against a witness, victim or informant. None of these provisions are jurisdictional in nature.

It is clear that these statutes proscribe criminal offenses for which the United States may institute prosecution. Federal courts are given a grant of jurisdiction to hear cases involving

offenses against the laws of the United States in 18 U.S.C. §3231.

As the case at bar is not a criminal prosecution by the United States and the aforementioned allegations for jurisdiction are non-jurisdictional, this Court does not have the requisite jurisdiction over Mr. Potter's claims asserting violations of the aforementioned federal criminal statutes.

42 U.S.C. §§ 1985(2), 2000e-2 and 2000e-3:

Mr. Potter also alleges subject matter jurisdiction under §1985(2), which addresses conspiracy to interfere with civil rights by obstructing justice, and by intimidating a party, witness or juror. It is also alleged that jurisdiction is based on 42 U.S.C. §2000e-2, which proscribes discrimination because of race, color, religion, sex or national origin and §2000e-3 which proscribes

other unlawful employment discrimination practices by employers against employees and applicants for employment. These provisions of Title 42 are not jurisdictional but are instead remedial. In Howard v. State Department of Highways, 478 F.2d 581 (10th Cir. 1973), the court held that §1985 clearly created no separate rights itself but, instead, conferred remedies for enforcement of rights arising under the Federal Constitution or Federal Law and makes grants of federal jurisdiction to hear cases and where no substantial federal question is presented, dismissal for want of jurisdiction was proper.

Sections 2000e-2 and 2000e-3 are provisions of Title VII of the Civil Rights Act of 1964. As indicated previously, these provisions are also remedial and intended to eliminate inconvenience, unfairness and the humility of discrimi-

nation. Sedlacek v. Hach, 752 F.2d 333 (8th Cir. 1985). See also, Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977). Therefore, the provisions upon which Mr. Potter has relied for jurisdiction under Title 42 are not applicable as they are non-jurisdictional.

The jurisdictional prerequisites for bringing Title VII actions are enumerated in 42 U.S.C. §2000e-5. Section 2000e-5 specifies the procedures for filing discrimination claims against employers for unlawful employment practices as well as the time parameters for filing a claim and the various rights of the parties. A complaining party must satisfy two jurisdictional prerequisites in order to bring suit under Title VII: (a) A charge must be filed with the Equal Employment Opportunity Commission

(hereinafter referred to as the "E.E.O.C."), and (b) Statutory notice from the E.E.O.C. of the right to sue must be received. This Court has upheld the two-part jurisdictional requirement for Title VII actions, ruling that Plaintiffs must have filed a charge with the E.E.O.C. and, secondly, must have received a right to sue letter from the E.E.O.C. and acted upon it. Alexander v. Gardner-Denver Company, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973). In the case at bar, Mr. Potter has not sufficiently exhausted the administrative remedies available to him thus enabling him, as an aggrieved party, to maintain an action with this Court. Therefore, the Court must conclude that the jurisdictional requirements for

maintaining an action with this Court have not been met.

In addition, in order to assert a discrimination claim under Title VII, a claimant must file a complaint with the E.E.O.C. within 180 days after the alleged discriminatory practice occurred. 42 U.S.C. §2000e-5(e)(1974). This 180-day period begins to run from the time the complainant knows or reasonably should know that the challenged act has occurred. Allen v. U.S. Steel Corp., 665 F.2d 689, 692 (5th Cir. 1982); Stafford v. Muscogee County Board of Education, 688 F.2d 1383 (11th Cir. 1982).

In light of the clear statutory language and controlling precedent, this Court must conclude that it is deprived of any jurisdiction to render any decision under Title VII.

29 U.S.C. §§201 and 215(a)(3):

Mr. Potter also asserts as a basis for jurisdiction the Fair Labor Standards Act which is codified in 29 U.S.C. §215(a)(3). That provision makes it unlawful for an employer covered by the Act to discharge or discriminate against an employee because the employee has filed a complaint or instituted a proceeding under or related to the Act. This provision was designed to insure effective enforcement of the Act by permitting employees to feel free to approach officials with their grievances. As with the previous allegations of jurisdiction, this provision also fails to create jurisdiction in this Court as it is non-jurisdictional. The jurisdictional basis of the Fair Labor Standards Act is codified in 29 U.S.C. §216(b).

Further, 29 U.S.C. §203(d) defines an "employer" as any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization or anyone acting in the capacity of officer or agent of such labor organization. This definitional provision adopts the definition of the term "employer" as being broader than that of common law, contemplating the possibility of several simultaneous "employers" any of which may be liable as an employer under the Fair Labor Standards Act. Hodgson v. Arnheim and Neely, Inc., 444 F.2d 609 (3rd Cir. 1971), rev'd on other grounds 410 U.S. 512, 93 S.Ct. 1138, 35 L.Ed.2d 463, reh. den. 411 U.S. 940, 93 S.Ct. 1888, 36 L.Ed.2d 402. Thus, if Mr. Potter had properly asserted the provisions for

Federal jurisdiction under the Fair Labor Standards Act, the definitional requirements found in §203(d) provide for jurisdiction over Defendant/Appellee Berger as well as Defendant/Appellee Wackenhut Corporation. However, Defendant/ Appellee, The Home Insurance Company, the workers' compensation carrier for Wackenhut Corporation, would not qualify as an employer pursuant to the aforementioned definitial section, specifically, §203(d).

Mr. Potter has also asserted that his termination was allegedly due to a complaint which he rendered to the Occupation Safety and Health Administration under Title 29. This allegation was not made in Mr. Potter's Complaint entered in this cause. As was held in George v. Aztec Rental Center, 763 F.2d 184 (5th Cir. 1985), federal law does not provide for a private cause of action

for a retaliatory discharge for such a complaint to the Occupation Safety and Health Administration.

Therefore, whether one assumes that Mr. Potter is proceeding under the Fair Labor Standards Act or his alleged complaint to the Occupation Safety and Health Administration, he has not provided this Court with any recognized claim under Federal Law.

28 U.S.C. §1343:

Mr. Potter further seeks to ground this Court's jurisdiction under the provisions of 28 U.S.C. §1343. The provisions of 28 U.S.C. §1343 give jurisdiction to federal courts in certain civil rights cases, Duffield v. Memorial Hospital Association, 361 F.Supp. 398 (DC W.Va. 1973), further, it is a jurisdictional statute and does not create any substantive rights. Jewell

v. Covington, supra, at 460. The jurisdiction conferred upon the federal courts by 28 U.S.C. §1343 is limited and redress for invasion by an individual of civil rights of another must be sought in state courts, unless diversity of citizenship is present. Harley v. Oliver, 404 F.Supp. 450 (D.C. Ark. 1975), aff'd on other grounds, 539 F.2d 1143 (8th Cir.). See, Love v. Chandler, 124 F.2d 785 (8th Cir. 1942), holding the Federal Civil Rights Statute was intended to provide for redress against state action and did not have the affect of taking into Federal control protection of private rights against invasion by individuals. See also, Aasum v. Good Samaritan Hospital, 542 F.2d 792 (9th Cir. 1976) holding it is only when asserted discriminatory conduct is of constitutional dimension and results from action under color

of state law, that jurisdiction under 28 U.S.C. §1343 attaches, and it is only when the state has "significantly" involved itself with discrimination that prohibition results. Further, in Syrek v. Pennsylvania Air National Guard, 371 F.Supp. 1349 (W.D. Pa. 1974), the court held that if the conduct complained of is practiced by a person or organization acting privately and not under color of State law, then there is no Federal jurisdiction under 42 U.S.C. §1983 or 28 U.S.C. §1343.

The essential "state action" element of a cause of action under 42 U.S.C. §1983 and jurisdiction under 28 U.S.C §1343 lends further support to dismissal in this cause for lack of subject matter jurisdiction as no state action has been alleged.

In addition, a grant of jurisdiction found in 28 U.S.C. §1343 is tempered by the "substantial federal question doctrine" which requires dismissal of any claim which does not really and substantially involve a dispute or controversy properly within the Federal court's jurisdiction. In Wiley v. National Collegiate Athletic Association, 612 F.2d 473 (10th Cir. 1979), the court held that where clearly defined constitutional principles were not at issue, the suits of student-athletes displaced with High School Athletic Association or NCAA rules did not present a substantial federal question and, thus, no jurisidiction was conferred under §1343 of an action by a student-athlete challenging the NCAA regulations rendering him ineligible to compete in intercollegiate athletic activities because he received a Federal

Education Grant and Scholarship exceeding NCAA limitations.

The allegations asserted by Mr. Potter as to the actions of private parties as well as the allegation of an assault and battery present no substantial federal question necessary to support federal jurisdiction. More specifically, in Williams v. Bennett, 689 F.2d 1370 (11th Cir., 1982), cert. den., 104 S.Ct. 335 (1983), the court held that the district court was without subject matter jurisdiction over assault and battery claims between inmates.

As no substantial federal question has been presented by Mr. Potter and no State action has been alleged, dismissal for lack of federal jurisdiction is appropriate.

26 U.S.C. §6051(a):

Mr. Potter also seeks to predicate

subject matter jurisdiction of this Court upon 26 U.S.C. §6051(a). This is a provision of the Internal Revenue Code which requires employers to provide certain documents and receipts to employees. As with the alleged jurisdiction in Title 18 and Title 42, this provision of the Internal Revenue Code is not jurisdictional. It simply imposes certain obligations upon employers and a failure to furnish the aforementioned information to the employee constitutes a criminal offense subjecting the employer to a fine and imprisonment pursuant to 26 U.S.C. §7204.

Thus, Mr. Potter's claims under Title 26 lack subject matter jurisdiction because they do not arise in the context of a civil suit by the United States at the insistence of the Attorney General or a criminal prosecution by the United

States.

Florida Statutes §440:

Florida Statues, Chapter 440, which encompases the Florida Workers' Compensation Act, has been frequently upheld against attacks of being unconstitutional. An attempt by Mr. Potter to assert the pendant jurisdiction of this court over state law claims is without merit as the alleged federal claims he has asserted do not have sufficient substance to invoke the subject matter of this Court.

Further, where there are no federal claims and no diversity of citizenship, causes of action arising under state law must be dismissed. Prince v. Wallace, 568 F.2d. 1176 (5th Cir. 1978).

Therefore, as Mr. Potter has failed to allege the necessary requisites for pendant jurisdiction of this Court and has failed to establish that diversity

of citizenship is present, the State claims should be dismissed.

Conclusion:

For the foregoing reasons, the undersigned respectfully requests this Honorable Court to dismiss the appeal entered in this cause on the ground that the Appeal is not within this Court's jurisdiction.

B. Motion to Dismiss this Appeal Because it was Not Taken in Conformity with the Supreme Court Rules.

It is asserted that further appellate review, if any, should be by way of Petition for Writ of Certiorari as opposed to review by way of an Appeal. The term "Appeal" is used to denote the right of a litigant to invoke the obligatory jurisdiction of this Court. None of the allegations asserted by Mr. Potter fall within the obligatory jurisdiction of this Court. Therefore, any review by this Court should be by way of Certiorari.

II. MOTION TO AFFIRM THE JUDGEMENT SOUGHT TO BE REVIEWED ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON THE GROUND THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.

This Motion to Affirm is entered pursuant to Supreme Court Rule 16, 1(c).

As the aforementioned discussion regarding the Motion to dismiss this Appeal indicates, Mr. Potter has failed to state a cause of action within the jurisdiction of this Court and, therefore, further argument regarding the substantive issues in this cause would be futile.

The aforementioned discussion has shown that Mr. Potter's allegations of federal jurisdiction have been precluded by controlling authority and, therefore,

no further consideration is warranted. Manfredi v. Maher, 435 F.Supp. 1106 (D.C. Conn. 1977).

Therefore, based on the foregoing, the undersigned respectfully requests this Court to affirm the judgment entered by the United States Court of Appeals for the Eleventh Circuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and forty copies of the foregoing has been furnished by U.S. Mail to the Honorable Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, Washington, D.C., 20543; and copies to G. Hunter Gibbons, Esquire, 1750 Ringling Boulevard, Sarasota, Florida, 34236; David A. Potter, Box 3-I, 115 10th Street West, Palmetto, Florida, 34221-3901; Alley & Alley Chartered, 205 Brush Street, Tampa, Florida, 33601; and Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida, 32301, this 2nd day of February, 1988.

JOHN N. JENKINS, ESQUIRE
Marlow, Shofi, Smith, Hennen,
Smith & Jenkins, P.A.
2907 Bay to Bay Blvd., Suite 201,
Tampa, Florida 33629
(813) 831-5599
ATTORNEY FOR APPELLEE,
THE HOME INSURANCE COMPANY

SWORN TO AND SUBSCRIBED before me this ____ day of February, 1988.

_____

NOTARY PUBLIC
State of Florida at Large

My Commission Expires:

_____